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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-653

THE STATE OF MICHIGAN,
Petitioner,

vs

RICHARD BERT MOSLEY,
Respondent.

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	Page
Index of Authorities	iii
Questions Presented	1-2
Constitutional and Statutory Provisions Involved	3-4
Statement of the Case	4-11
Summary of Argument	12-15
Conclusion	15-16

Argument:

A.

Under the totality of circumstances—including the illegal arrest of respondent because of lack of probable cause, the violation by the police of state law in failing to take respondent before a judge without unnecessary delay after his arrest so that he might be informed of his rights by the judge, the exercise by respondent of his right to remain silent during custodial interrogation, the "turning over" of respondent by the first interrogating officer to another for the purposes of further interrogation without the first officer's informing the second officer that respondent had exercised his right to remain silent, the confronting of respondent by the second officer with a "confession" of a purported accomplice which was not a confession, and the age of respondent of 18 years—the prosecution did not carry its heavy burden of proving a waiver by respondent to remain silent before a confession was elicited from him 17

Page

1. Respondent was illegally arrested because the arresting officer had neither a warrant for his arrest nor probable cause to believe that he had committed a crime..... 17
2. Custodial interrogation is *per se* coercive 18
3. Respondent was not taken by the police officers before a judicial officer without unnecessary delay after his arrest so that he could be informed of his rights by the judicial officer in clear violation of his rights under Michigan statute..... 19
4. A confession elicited from a prisoner during that period when he could have been taken before a judge and his being so taken was delayed specifically for the purpose of eliciting a confession is not admissible in evidence 22
5. When a prisoner during custodial interrogation indicates his desire to remain silent, the interrogation must cease..... 25
6. Once a prisoner during custodial interrogation has exercised his right to remain silent, all further questioning of him must cease 25
7. Once a prisoner during custodial interrogation has exercised his right to remain silent, the requirement that all questioning of him cease cannot be circumvented by the simple expedient of shuttling him off to different police officers for further questioning without the succeeding police officers being told that the prisoner exercised his right to remain silent..... 26

Page

8. A confession obtained by trick is not a voluntary confession if other coercive elements are present..... 38

B.

A state court decision should not be overturned by this Court if it can be justified under state law and the decision does not contravene constitutional standards set by this Court..... 42

Conclusion 44

AUTHORITIES CITED

Cases:

Aguilar v Texas, 378 US 108; 84 S Ct 1509 (1964) 17

Bram v United States, 168 US 532; 18 S Ct 183 (1897) 40

Combs v Wingo, 465 F2d 96 (CA6 1972) 35

Doss v Bensinger, 463 F2d 576 (CA7 1972)..... 29

Everette v Murphy, 329 F2d 68 (CA2 1964)..... 41

Frazier v Cupp, 394 US 731; 89 S Ct 1420 (1969) 38

Hill v Whealon, 490 F2d 629 (CA6 1974)..... 37

Johnson v Zerbst, 304 US 458; 58 S Ct 1019 (1938) 29, 30

Keiper v Cupp, 509 F2d 238 (CA9 1975)..... 21

Mallory v United States, 354 US 449, 77 S Ct 1356 (1957) 23

McIntyre v New York, 329 F Supp 9 (ED NY 1971) 29

	Page
Mitchell v United States, 434 F2d 483 (CADC 1970)	30
Miranda v Arizona, 384 US 436, 86 S Ct 1602 1966)	18, 19, 20, 21, 25, 27, 28, 31, 32, 33, 34, 35, 39, 42, 43
Oregon v Hass, — US —, 95 S Ct 1215 (1975)	44
People v Guertins, 224 Mich 8 (1923)	17
People v Hamilton, 359 Mich 410 (1960)	23
People v Miller, 245 Mich 115 (1928)	17
People v Tubbs, 22 Mich App 549 (1970)	28
People v Zeigler, 358 Mich 355 (1960)	17
Rogers v Richmond, 365 US 534, 81 S Ct 735 (1961)	41
Schneckloth v Bustamonte, 412 US 218, 93 S Ct 2041 (1973)	21
Spinelli v United States, 393 US 410, 89 S Ct 584 (1969)	17
State v Watson, 487 P2d 197 (N Mex 1971)	39
United States v Barnes, 432 F2d 89 (CA9 1970)	31
United States v Clark, 499 F2d 802 (CA4 1974)	36
United States v Collins, 462 F2d 792, 802 (CA2 1972)	37
United States v Cooper, 499 F2d 1060 (CADC 1974)	36
United States v Cooper, 504 F2d 260 (CADC 1974)	20, 21
United States v Crisp, 435 F2d 354 (CA7 1970)	28
United States v Hedgeman, 368 F Supp 585 (ED Mich 1973)	36

	Page
United States v Hill, 340 F Supp 344 (ED Penn 1972)	30
United States v Hopkins, 433 F2d 1041 (CA5 1970)	32, 33
United States v Poole, 495 F2d 115 (CADC 1974)	34
Westover v United States, 384 US 494, 86 S Ct 1638 (1966)	33
Williams v Brewer, 509 F2d 227 (CA8 1975)	35

Constitutions:

4th Amendment, United States Constitution	3, 17
5th Amendment, United States Constitution	3, 36, 43
Article 1, Section 11, Michigan Constitution 1963	4, 17
Article 1, Section 17, Michigan Constitution 1963	3, 27

Statutes:

Michigan Compiled Laws Annotated 764.13	4, 19, 22, 23
Michigan Compiled Laws Annotated 764.26	4, 19, 22, 23

Rules:

Rule 5(a), Federal Rules of Criminal Procedure	19, 20, 21, 22, 23

Other:

VIII Wigmore on Evidence (McNaughton Revision) p 266	42

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QUESTIONS PRESENTED

A.

WHETHER UNDER THE TOTALITY OF THE CIRCUMSTANCES—INCLUDING THE ILLEGAL ARREST OF RESPONDENT BECAUSE OF LACK OF PROBABLE CAUSE, THE VIOLATION BY THE POLICE OF STATE LAW IN FAILING TO TAKE RE-

SPONDENT BEFORE A JUDGE WITHOUT UNNECESSARY DELAY AFTER HIS ARREST SO THAT HE MIGHT BE INFORMED OF HIS RIGHTS BY THE JUDGE, THE EXERCISE BY RESPONDENT OF HIS RIGHTS, TO REMAIN SILENT DURING CUSTODIAL INTERROGATION, THE "TURNING OVER" OF RESPONDENT BY THE FIRST INTERROGATING OFFICER TO ANOTHER FOR PURPOSES OF FURTHER INTERROGATION WITHOUT THE FIRST OFFICER'S INFORMING THE SECOND OFFICER THAT RESPONDENT HAD EXERCISED HIS RIGHT TO REMAIN SILENT, THE CONFRONTING OF RESPONDENT BY THE SECOND OFFICER WITH A "CONFESSION" OF A PURPORTED ACCOMPLICE WHICH WAS NOT A CONFESSION, AND THE AGE OF RESPONDENT OF 18 YEARS—THE PROSECUTION CARRIED ITS HEAVY BURDEN OF PROVING A WAIVER BY RESPONDENT TO REMAIN SILENT BEFORE A CONFESSION WAS ELICITED FROM HIM.

B.

WHETHER A STATE COURT DECISION SHOULD BE OVERTURNED BY THIS COURT IF IT CAN BE JUSTIFIED UNDER STATE LAW AND THE DECISION DOES NOT CONTRAVENE CONSTITUTIONAL STANDARDS SET BY THIS COURT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Fifth Amendment to the Constitution of the United States.*

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." *Article 1, Section 17, Michigan Constitution of 1963.*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Fourth Amendment to the Constitution of the United States.*

"The person, houses, papers and possessions of every person shall be secure from unreasonable

searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." *Article 1, Section 11, Michigan Constitution of 1963.*

"A peace officer who has arrested a person for a felony without a warrant must without unnecessary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed, and must make before the magistrate a complaint, stating the offense for which the person was arrested." *Mich Comp Laws Ann 764.13.*

"Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." *Mich Comp Laws Ann 764.26.*

STATEMENT OF THE CASE

Respondent was accused of and convicted of the murder of one Leroy Williams during the perpetration of a robbery of him.

The sole evidence against respondent at trial was his confession and the testimony of a purported accomplice who had been granted immunity for his testimony. This purported accomplice was Anthony Smith.

Leroy Williams, the victim of the hold-up slaying, was slain in the first week of January, 1971 (A. 5).* Respondent was arrested on April 8, 1971 at 1:05 pm in front of his residence (A. 4). The police officer who arrested respondent did not have a warrant for his arrest (A. 11). The sole and exclusive basis which the arresting officer had for the arrest of respondent was a certain anonymous telephone call which he had received (A. 12).

The arresting officer was Sergeant Cowie. He received the anonymous telephone call a day or more before the day of arrest, he couldn't be sure, and some time between 8:00 am and 4:00 pm since he was working days (A. 11). He made no notes of the anonymous telephone conversation (A. 11). Cowie didn't know who the anonymous caller was and had never heard his voice before (A. 6).

The anonymous caller told Cowie the names of "several persons that were operating on the lower east side, holding up places" (A. 4, 5), and the caller gave the names of respondent, Anthony Smith, Charles Little, Ernest Thompson and Richard Christian (A. 5). The caller mentioned as specific places that the named persons might have held up the Blue Goose Bar and Leroy Williams (A. 5). Leroy Williams was allegedly held up in front of the 101 Ranch Bar.

Cowie said that he had arrested respondent for investigation of robbery armed of the Blue Goose Bar and the White Tower Restaurant, both mentioned by the anonymous caller (A. 12). Respondent was taken to police headquarters (A. 6). He arrived there at 2:15 pm (A. 12). Cowie did

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* The A in the parentheses refers to the Appendix filed in this case; the numbers, to the pages within.

not apply for a warrant of arrest for respondent for the Blue Goose Bar because "it was learned he was not involved" (A. 12), and he didn't apply for a warrant for the robbery of the White Tower Restaurant because he had not talked to respondent and he felt that he needed more information before he applied for a warrant (A. 12, 13).

Cowie could have taken respondent before a judge of Recorder's Court for the City of Detroit [located directly across the street from police headquarters] between 2:15 pm and 4:30 pm of the day of arrest but did not because he hadn't completed his investigation (A. 13).

Instead, Cowie began questioning respondent about 2:30 pm and he finished about 4:00 pm (A. 10). Cowie talked to respondent "in regards to several robberies that had been committed in the lowest east side, out around the vicinity of Mack and the Hillger area" (A. 9). Cowie said he did not question respondent about the robbery and murder [of Leroy Williams] at the 101 Ranch Bar at 3401 Hillger (A. 9).

At the time of his arrest, respondent was 18 years old (A. 41). Cowie started to talk to respondent on the day of arrest at 2:30 pm and he was "finished" at 4:00 pm but he didn't talk to respondent continuously during this time (A. 14). Cowie talked to respondent for about 20 minutes after 2:30 pm (A. 14). It was during this 20 minute segment that respondent declined to answer questions (A. 15). Respondent "declined to answer" "[a]nything about the robberies" (A. 13). The second time that Cowie spoke to respondent, at 4:00 pm or 4:30 pm, it was "just to inform him that I was turning him over to the Homicide Bureau and Sergeant Hill" (A. 15). In between these two times that Cowie spoke to respondent, Cowie spoke to Anthony

Smith (A. 15). Respondent and Anthony Smith were spoken to by Cowie separately and one did not hear what the other had been asked by Cowie (A. 15). Of course, Anthony Smith was in custody as a result of having been arrested.

At about 4:00 pm, Cowie turned respondent over to Sergeant Hill (A. 12). Cowie talked to Hill concerning the turning over of respondent to him (A. 15). Cowie first testified that he told Hill that respondent declined to answer any questions and then he testified that he did not tell Hill that at all (A. 16). Then Cowie testified that when he turned respondent over to Hill, he had a conversation with Hill but that he couldn't recall "the exact words verbatim" but that he was turning respondent over to Hill "for further questioning in the Leroy Williams thing" (A. 16). Then Cowie testified that he had not questioned respondent about the Leroy Williams "thing" (A. 16).

Hill testified that he first saw respondent on the day of respondent's arrest in police headquarters at 6:20 pm when Hill went to "get him" for interrogation (A. 21). Hill had conversation with Cowie at about 3:30 pm (A. 22) and Cowie had told Hill that Cowie had talked to both respondent and Smith and Cowie told Hill that respondent "hadn't given any statement at all, I believe he denied implications (sic) or something like this" (A. 23). Cowie had told Hill that he had given respondent his *Miranda* warnings (A. 23).

Hill read respondent his *Miranda* rights at 6:35 pm, respondent indicated that he understood his rights, and respondent signed the rights form (A. 28). Hill then took a statement from respondent; prior to taking this statement, Hill told respondent that "Anthony Smith had al-

ready confessed to this particular crime and had implicated him [respondent]" (A. 28). Hill told respondent that "they were charged with Murder, and I told him that all we had at that time was Anthony Smith's statement, and Anthony Smith said that he was the man with the gun. And I also told him that as far as we know for sure, since we were not there, Anthony Smith might have been the man with the gun" (A. 33).

Hill then testified that respondent had a "[w]hat's the use look on his face" and made a confession of his guilt (A. 33).

Hill testified that he spoke to Anthony Smith between 4:00 pm and 6:35 pm on April 8 at which time Anthony Smith made an oral confession implicating respondent but that a formal written confession was not taken from Anthony Smith until the morning of April 9 (A. 35), whereas respondent's oral confession and written confession were taken at 6:30 pm and 6:35 pm respectively on April 8 (A. 36) in "one continuous action" (A. 29).

It must be noted that Hill testified that Smith "denied that he had robbed the man or touched the man, but he did not deny being there and seeing the man grabbed, or hearing the shot. He did not deny this. But he denied a physical participation in the robbery itself" (A. 37) when Hill spoke to Smith on the evening of April 8 (A. 37). Also Smith "denied pulling the trigger, or planning the robbery, but he did not deny being there and witnessing the robbery" (A. 37).

When Hill was asked whether he thought on the basis of Smith's oral statement on the evening of April 8 that he had a confession from Smith (A. 39), Hill answered

"My answer is no" (A. 40), but Hill did then state that he told respondent that "Anthony Smith confessed and implicated" respondent (A. 40).

Then the court took over the questioning of Hill:

> The Court: Was there any particular reason why you would tell him that if you didn't think the man had confessed?
>
> The Witness [Hill]: Yes, sir.
>
> The Court: What reason?
>
> The Witness: I have done it a lot of times when there has been no confession.
>
> The Court: Yes, but why do you do that? Are you trying to get him to confess by telling him that?
>
> The Witness: I wasn't trying to get him to confess in this instance, but I have done that.
>
> The Court: With that expectation?
>
> The Witness: Yes, sir.
>
> The Court: In other words, you are going to trick him into it?
>
> The Witness: Well, I would tell them their partners have confessed.
>
> The Court: I mean, you are going to trick him into it?
>
> The Witness: To see if he would deny it. No, sir, I don't always tell a prisoner the truth.
>
> The Court: You don't think you should?
>
> The Witness: I would tell him sometimes we have their fingerprints, and we don't have it, or something along this nature.
>
> The Court: All right (A. 40-41).

Respondent testified that at the time of his arrest, he was 18 years old (A. 41). After respondent signed the

rights form given to him by officer Hill, Hill told respondent that Anthony Smith had already made a statement (A. 43) putting everything on respondent (A. 44), and Hill told respondent to go ahead and tell everything and that he might get off light (A. 43), that he was charged with murder in the first degree and that this charge carried life (A. 43) whereas manslaughter carried a maximum of 15 years with the possibility of probation (A. 44) and that Hill would talk to the judge and try to get the charge reduced to manslaughter (A. 43).

In timely manner, prior to trial, respondent moved the trial court to suppress as evidence his confession on the following grounds: (1) respondent's arrest was illegal and, therefore, his confession was the fruit of that illegality; (2) respondent's confession had been coerced because he was not taken before a judge after his arrest without unnecessary delay and that his being taken before a judge was delayed specifically for the purpose of the police interrogating him and that the police did interrogate him during that period for the specific and sole purpose of obtaining incriminating evidence against him; (3) that respondent during custodial interrogation exercised his right to remain silent and that all questioning of him should have ceased and that the renewed questioning of him by Hill was in violation of the rule that all questioning of a prisoner who exercises his right to remain silent must cease; (4) that the rule that all questioning of a prisoner must cease when he exercises his right to remain silent cannot be circumvented by the simple expedient of shuttling him from police officer to police officer; (5) that respondent's confession was obtained through trickery and promises of leniency.

The trial court denied respondent's motion, and on trial, respondent's confession was admitted in evidence, read to

the jury and the written statement of the confession was allowed in the jury room.

Respondent's confession and the testimony of Anthony Smith who was granted immunity for his testimony was the sole evidence against respondent.

The jury returned a verdict of guilty of first degree murder against respondent and the court sentenced respondent to a life term.

Respondent appealed his conviction and sentence as a matter of right in timely manner to the Michigan Court of Appeals, presenting for that Court's review several grounds of alleged error including all of the grounds for the suppression of respondent's confession which respondent had urged in his motion to suppress the confession prior to trial.

Of all of the issues raised by respondent in the Michigan Court of Appeals, the Court reached one and only one issue: Can the requirement of *Miranda* that all questioning of a prisoner cease when he exercises his right to remain silent be circumvented by the simple expedient of shuttling the prisoner from police officer to police officer for further questioning?

The Michigan Court of Appeals answered the question in the negative, reversed respondent's conviction, ordered a new trial and instructed the trial court to suppress as evidence respondent's confession.

Dissatisfied with such ruling, the prosecution applied to the Michigan Supreme Court for leave to appeal to that Court; this application was denied.

This Court granted the People of the State of Michigan a Writ of Certiorari to the Michigan Court of Appeals.

SUMMARY OF ARGUMENT

Respondent's confession was admissible in evidence on trial against him only if it was freely and voluntarily given.

Respondent's confession was not freely and voluntarily given and must be deemed coerced for the following reasons:

1—Respondent had been arrested in violation of his right to be secure in his person from unreasonable seizure. The arresting officer Cowie had neither a warrant for respondent's arrest nor probable cause to believe that he had committed any crime. The sole basis of Cowie's arrest of defendant was a telephone call from a person utterly unknown to Cowie whose voice on the telephone he had never heard before.

2—Respondent's confession was elicited from him while he was being questioned while in police custody at police headquarters with neither an attorney nor any member of his family present. At the time he was 18 years old.

3—Respondent's custodial interrogation was rendered more coercive because during the period of his custodial interrogation from about 2:00 pm to 4:30 pm he could have been taken across the street from the place of his custodial interrogation to a courtroom and before a judge and there be advised of his rights in the premises and offered legal

counsel but the police officer who was interrogating respondent failed and neglected to do this because the officer felt that he didn't have enough information in the case with which to obtain a warrant for the arrest of respondent. This failure by the police officer to take respondent without unnecessary delay before the nearest judicial officer so that respondent could be advised by the judicial officer of his rights was in blatant violation of the prescriptions of Michigan statutory law.

4—A confession which is elicited from a prisoner during a period when he is deliberately withheld from being taken before a judicial officer after his arrest and questioned for the sole purpose of obtaining from him incriminating material with which to support the issuance of a warrant for his arrest is a confession obtained through and by means of coercive measures and is not one freely and voluntarily given.

5—Respondent had a right to remain silent during custodial interrogation. He clearly and unequivocally chose to exercise that right and expressed his choice clearly and unequivocally by stating that he didn't want to answer any questions about robberies.

6—The interrogating officer, Cowie, had the duty to stop his interrogation of respondent; Cowie acquitted such duty. But Cowie had a duty to advise officer Hill when he "turned over" the custody of respondent to Hill that respondent had exercised his right to remain silent.

If Hill had been advised by Cowie that respondent had exercised his right to remain silent, Hill would not have had the right to resume or continue the interrogation of respondent. The fact that Cowie failed and omitted to discharge his duty of informing officer Hill of respondent's exercise of his right to remain silent cannot and does not alter the basic situation: respondent had exercised his right to remain silent and such choice should have been respected by his custodians and all of them.

It is clear that once a person in custody has exercised his right to remain silent, all interrogation of him must cease. The police are not to be permitted to continually seek to interrogate the prisoner after he has once exercised his right to remain silent. This is because such action is *per se* coercive and adds to those pressures already bearing upon the prisoner and serve to overbear his will.

7—This requirement that all interrogation of a prisoner must cease once he had exercised his right to remain silent cannot be circumvented by the simple expedient of the police officer to whom the expression of the exercise of the right to remain silent was made "turning over" the prisoner to another police officer for further questioning without his informing the other police officer that the prisoner had exercised his right to remain silent.

8—It is an additional coercive element in the totality of circumstances for a police officer to approach a prisoner who has exercised his right to remain silent and who has not indicated in any manner that he desires to talk to a police officer to falsely tell the prisoner that another has confessed the crime and implicated the prisoner.

After respondent had exercised his right to remain silent when interrogated by officer Cowie, respondent did not indicate in any manner that he desired to talk to a police officer. It is clear that Hill approached respondent for the specific purpose of eliciting a confession from him. Hill was not honest with respondent. Hill told respondent that Anthony Smith had confessed. Anthony Smith's statements to Hill had not been considered by Hill as a confession. It is clear that Hill told respondent that Anthony Smith had confessed in order to trick respondent.

Respondent was frightened by Hill into making a confession by stating that murder in the first degree carried a life term while manslaughter carried but 15 years and that the choice was up to respondent as to which he wanted to be sentenced under.

When a prisoner has exercised his right to remain silent, the procesution has a very heavy burden to prove that the prisoner waived his right to remain silent while under custodial interrogation and that his waiver was free and voluntary.

CONCLUSION

The prosecution had utterly failed to prove that respondent who had been arrested without warrant and without probable cause and who was not, as required by law, taken without unnecessary delay before a judicial officer to be informed of his right and who was interrogated during the period when he should have been taken before a judicial officer specifically to elicit incriminating statements from him and who exercised his right to remain silent and who thereafter in no manner indicated that he desired to talk

to a police officer and who was falsely told by a second police officer that an alleged accomplice has confessed and implicated him, had freely and voluntarily waived his right to remain silent.

In view of the totality of circumstances attending the elicitation of respondent's confession—including the illegal arrest of respondent, the violation by the police of state law in failing to take respondent without unnecessary delay after his arrest before a judicial officer so that he might be informed of his rights in the premises, the exercise by respondent of his right to remain silent during custodial interrogation, the turning over of respondent by Cowie to Hill without Cowie's informing Hill that respondent exercised his right to remain silent, the renewed questioning by Hill of respondent without respondent's in any manner indicating his desire to talk to a police officer, the confronting of respondent by Hill with a "confession" of a purported accomplice which was not a confession—it cannot be said and should not be said that the prosecution has carried its very heavy burden of proving a free and voluntary waiver by respondent of his right to remain silent.

The decision of the Michigan Court of Appeals which is being challenged herein can be justified and supported by the Michigan Constitution and Michigan statutes and Michigan court decisions, and does not contravene any federal constitutional standard established by this Court. Therefore, the decision should not be disturbed.

ARGUMENT

A.

UNDER THE TOTALITY OF CIRCUMSTANCES—INCLUDING THE ILLEGAL ARREST OF RESPONDENT BECAUSE OF LACK OF PROBABLE CAUSE, THE VIOLATION BY THE POLICE OF STATE LAW IN FAILING TO TAKE RESPONDENT BEFORE A JUDGE WITHOUT UNNECESSARY DELAY AFTER HIS ARREST SO THAT HE MIGHT BE INFORMED OF HIS RIGHTS BY THE JUDGE, THE EXERCISE BY RESPONDENT OF HIS RIGHT TO REMAIN SILENT DURING CUSTODIAL INTERROGATION, THE "TURNING OVER" OF RESPONDENT BY THE FIRST INTERROGATING OFFICER TO ANOTHER FOR PURPOSES OF FURTHER INTERROGATION WITHOUT THE FIRST OFFICER'S INFORMING THE SECOND OFFICER THAT RESPONDENT HAD EXERCISED HIS RIGHT TO REMAIN SILENT, THE CONFRONTING OF RESPONDENT BY THE SECOND OFFICER WITH A "CONFESSION" OF A PURPORTED ACCOMPLICE WHICH WAS NOT A CONFESSION, AND THE AGE OF RESPONDENT OF 18 YEARS—THE PROSECUTION DID NOT CARRY ITS HEAVY BURDEN OF PROVING A WAIVER BY RESPONDENT TO REMAIN SILENT BEFORE A CONFESSION WAS ELICITED FROM HIM.

1. Respondent was Illegally Arrested Because the Arresting Officer had Neither a Warrant for his Arrest Nor Probable Cause to Believe that he had Committed a Crime.

Nothing can be clearer at this point than that respondent was arrested utterly without probable cause in contravention of his rights under the *Fourth Amendment to the Constitution of the United States* and *Section 11, Article 1, of the Michigan Constitution of 1963.*

That an arrest made on the basis of anonymous information does not meet the requirements of the United States

Constitution is made clear by *Aguilar v Texas,* 378 US 108, 84 S Ct 1509 (1964) and *Spinelli v United States,* 393 US 410, 89 S Ct 584 (1969) and that it does not meet the requirements of the Michigan Constitution is made clear by *People v Guertins,* 224 Mich 8 (1923) and *People v Miller,* 245 Mich 115 (1928) and *People v Zeigler,* 358 Mich 355 (1960).

2. Custodial Interrogation is Per Se Coercive.

It has been recognized that the prisoner's being alone in a strange environment in custody of the police and subjected to interrogation for no other reason than to compel him to incriminate himself is *per se* coercive.

> "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself." *Miranda v Arizona,* 384 384 US 436, 457-458; 86 S Ct 1602, 1619 (1966).

3. Respondent was not Taken by the Police Officers Before a Judicial Officer Without Unnecessary Delay After His Arrest so that He Could be Informed of His Rights by the Judicial Officer in Clear Violation of Respondent's Rights Under Michigan Statute.

Further, it is perfectly clear that respondent could have been taken before a judge after his arrest and between the hours of 2:15 pm and 4:30 pm of the day of his arrest in conformity with the Michigan statute so that he might be informed of his rights by the *judge* and not by a police officer while incommunicado in the hostile atmosphere of a police lock-up, and that he was not so taken before a judge for the reason that the police wanted to question him for the purpose of obtaining information to support the issuance of a warrant for his arrest.

The two Michigan statutes set forth above—*MCLA 764.13* and *MCLA 764.26*—should be compared to *Rule 5(a) of the Federal Rules of Criminal Procedure.*

Of *Rule 5(a),* this Court said in *Miranda v Arizona,* 384 US 436, 86 S Ct 1602, 1622 (1966):

> "Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure, and the Court's effectuation of that Rule in *McNabb v United States,* 318 US 332, 63 S Ct 608, 87 LEd 819 (1943), and *Mallory v United States,* 354 US 449, 77 S Ct 1356, 1 LEd 2d 1479 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner 'without unnecessary delay' and excluding evidence obtained in default of that statu-

tory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb,* 318 US, at 343-344, 63 S Ct, at 614, and in *Mallory,* 354 US, at 455-456, 77 S Ct at 1359-1360, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.[32]

'32. Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo.L.J. 1 (1958).'"

Writing in concurrence with qualification in *United States v Cooper,* 504 F2d 260, 265 (CADC, 1974), Senior Circuit Judge Fahy, referring to the ruling that a *Miranda* waiver constitutes a waiver of the need to comply with Rule 5(a), opined:

"The ruling referred to I think is clearly inconsistent with the statement in *Miranda, supra,* that '[w]hen federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder.' In my opinion the ruling is inconsistent also with good reason; it overlooks *the vast difference in these matters between public advice and warning by a magistrate,* with tender of counsel, as required by Rule 5(a), and in-custody, non-public advice and warning, with tender of counsel, by the arresting officers at a police station or FBI office. To equate the two, and to equate a waiver obtained in these different circumstances, would be for me to repudiate the fundamental basis of the Supreme Court's approach

to this problem, namely, the suspect and coercive character of in-custody interrogation."

After observing that the *Miranda* waiver obtained in the *Cooper* case, makes no mention of the duty imposed by Rule 5(a) and thus cannot accomplish a waiver of the requirements of Rule 5(a), Judge Fahy stated:

"Since, in my view, there was a failure of the officers to comply with Rule 5(a), resulting in Cooper not having been warned and advised by a magistrate, with tender of counsel, in the manner required by that Rule and the further applicable subdivisions of Rule 5, set forth, *supra,* I would hold the incriminating statement inadmissible. It cannot be inferred that the statement would have been made had Rule 5(a) been followed. The statement resulted directly from the in-custody interrogation which went forward in the absence of compliance with the requirements of *Miranda* that '[w]hen federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder.'" 504 F2d at 265.

The fact that respondent in the case at bar had been illegally arrested and was being held in illegal detention and the fact that the arresting officer did not comply with the Michigan states which required that the respondent be taken before a judicial officer without unnecessary delay by the arresting officer is pointed out here because the ultimate question whether respondent waived his right to remain silent should be decided on the basis of "the totality of the surrounding circumstances, including the characteristics of the accused *and the complete details of his detention and interrogation*". *Keiper v Cupp,* 509 F2d 238, 242 (CA 9 1975). (Emphasis added.) Cf *Schneckloth v Bustamonte,* 412 US 218, 93 S Ct 2041 (1973).

4. A Confession Elicited from a Prisoner During that Period When He Could have Been Taken Before a Judge and His Being so Taken was Delayed Specifically for the Purpose of Eliciting a Confession is not Admissible in Evidence.

There are and were at the time of respondent's arrest extant in the State of Michigan the following statutes:

> "A peace officer who has arrested a person for a felony without a warrant must without unnecessary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed, and must make before the magistrate a complaint, stating the offense for which the person was arrested." *Mich Comp Laws Ann 764.13.*
>
> "Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." *Mich Comp Laws Ann 764.26.*

As stated above, it is perfectly clear that respondent could have been taken before a judge after his arrest and between the hours of 2:15 pm and 4:30 pm of the day of his arrest in conformity with the Michigan statute so that he might be informed of his rights by the *judge* and not by a police officer while incommunicado in the hostile atmosphere of a police lock-up, and that he was not so taken before a judge for the reason that the police wanted to question him for the purpose of obtaining information to support the issuance of a warrant for his arrest.

The essence of the quoted Michigan statutes is found in Rule 5(a) of the Federal Rules of Criminal Procedure. This Court said of Rule 5(a) in *Mallory v United States,* 354 US 449, 453-454, 77 S Ct 1356, 1359 (1957), as follows:

> "The requirement of Rule 5(a) is part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement. . . .
>
> • • • • •
>
> "The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause'. The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue or probable cause may be promptly determined. The arrested person may, of course, be 'booked' by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

Of *MCLA 764.13* and *MCLA 764.26* [referred to as sections 13 and 26] and *Rule 5(a),* the Michigan Supreme Court said in *People v Hamilton,* 359 Mich 410, 416-417 (1960), as follows:

> "Said sections 13 and 26, and Rule 5(a) of the Federal rules of criminal procedure, are quite alike and equally mandatory. Each requires that the person arrested be taken 'without unnecessary delay' before a judicial officer for the purposes of complaint and proceedings subsequent thereto.

"This does not mean that an arrested person cannot be 'booked' and questioned for such time of 'brief delay' as presented circumstances fairly require in order to determine the immediate question of release or complaint (*Mallory, supra,* at pages 454, 455 and *Cicenia v LaGay,* 357 US 504, 509, 510 [78 S Ct 1297, 2 L ed 2d 1523]). It does mean that an unnecessary and so unlawful delay of compliance with either of said sections 13 and 26, when done for prolonged interrogatory purposes and without proven justification of the delay, renders *involuntary* and so inadmissible whatever confessional admissions the detained person may have made while so unlawfully detained."

Cowie's failure to take respondent without unnecessary delay before a judicial officer was in violation of the law and his questioning respondent during the period of delay expressly for the purpose of extracting from respondent incriminating statements and the delay being occasioned especially for this purpose, if not rendering respondent's confession inadmissible in evidence, surely increased and augmented the coercive atmosphere of respondent's custodial interrogation and has a heavy bearing upon the question of respondent's having waived his right to remain silent.

5. When a Prisoner During Custodial Interrogation Indicates His Desire to Remain Silent, the Interrogation Must Cease.

This Court has delineated the procedures which must be followed when a prisoner during custodial interrogation exercises his right to remain silent in *Miranda v Arizona, supra:*

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 US at 473-4, 86 S Ct at 1627-1628.

6. Once a Prisoner During Custodial Interrogation has Exercised His Right to Remain Silent, all Further Questioning of Him Must Cease.

This Court in *Miranda v Arizona, supra* stated that once a prisoner has exercised his right to remain silent, further questioned further, a heavy burden devolves upon the prosecution to prove that the prisoner waived his right to remain silent:

"If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements," Footnote 44, 384 US at 474, 86 S Ct 1627-1628.

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel," *Id*, 384 US at 475, 86 S Ct at 1628.

7. Once a Prisoner During Custodial Interrogation has Exercised His Right to Remain Silent, the Requirement that all Questioning of Him Cease Cannot be Circumvented by the Simple Expedient of Shuttling Him Off to Different Police Officers for Further Questioning Without the Succeeding Police Officers Being Told that the Prisoner Exercised His Right to Remain Silent.

Cowie testified that before he questioned defendant after defendant's arrest, he gave defendant his so-called Miranda rights (A. 7). Cowie read the rights to defendant (A.7), and defendant told Cowie then that he completely understood his rights (A. 8) and defendant signed the Miranda rights form submitted to him by Cowie (A. 8).

Cowie questioned defendant about several robberies that had been committed in the lower east side in the

vicinity of Mack and Hillger (A. 9). Defendant declined to answer "(A)nything about the robberies" (A. 13).

Cowie notified Hill that he would like to turn defendant over to Hill for questioning in the Leroy Williams case (A. 10). Cowie testified that he had not questioned defendant on the Leroy Williams case (A. 9, 10).

When defendant declined to answer anything about the robberies to Cowie, it was a decision and expression by defendant to exercise his right under the *5th Amendment to the Constitution of the United States and Article 1, Section 17 of the Michigan Constitution* to remain silent. It then became the duty of the police to absolutely desist from asking defendant any more questions. The fact that defendant was turned over to Hill "for further questioning" and that Hill repeated the *Miranda* warnings to defendant cannot change the duty owed defendant by the police; the requirements of law cannot be circumvented so easily.

Since defendant clearly expressed his decision to exercise his constitutional right to remain silent, and since the police persisted in questioning defendant after he had exercised his constitutional right to remain silent, whatever statements were taken from defendant after he had exercised his constitutional right to silence, must be suppressed as involuntary.

The Court clearly and unequivocally expressed this principle in *Miranda v Arizona*, 384 US 436, 473; 86 S Ct 1602, 1627 (1966):

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in

any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."

After quoting the above language from *Miranda,* the Court observed, in *People v Tubbs,* 22 Mich App 549, 555 (1970), as follows:

"We conclude that the foregoing reference to the fact that whenever an individual *indicates* his desire to remain silent, the questioning must cease, is a rule to govern *the conduct of the proceedings* and is not the setting out of a special warning requirement."

(First emphasis by the Court; second emphasis added.)

The necessity to guard the spirit and letter of the *Miranda* decision and the right of individuals to exercise their 5th Amendment rights, was clearly expressed in *United States v Crisp,* 435 F2d 354, 357 (CA 7 1970):

"Both the letter and spirit of the Supreme Court's decision in *Miranda* call for condemnation of even this seemingly innocuous police conduct. The procedural safeguards imposed in that case were premised upon the observation that custodial interrogation in the absence of defense counsel is inherently intimidating and destructive of free enjoyment of the constitutional privilege against self-incrimination. To be effective, those safeguards must be fully observed, and the rights of the suspect must be jealously guarded. *Not even the slightest*

circumvention or avoidance may be tolerated. The rule that interrogation must cease, in whole or in part, in accordance with the expressed wishes of the suspect means just that and nothing else. Once the privilege has been asserted, therefore, an interrogator must not be permitted to seek its retraction, total or otherwise. . . .

"From this record, we can only conclude that the inquiry into Crisp's willingness to discuss these matters in the face of his clear statement that he did not wish to discuss any bank robbery amounted to an impermissible attempt to hedge his initial assertion of his right to silence on that matter." (Emphasis added.)

In a situation similar to the case at bar, the Court in *Doss v Bensinger,* 463 F2d 576, 578 (CA 7 1972), stated:

"It is apparent from the fact situation of the case at bar that Doss desired to remain silent notwithstanding continual attempts by the police to interrogate him. Close scrutiny of the testimony at trial with respect to the police officers' persistent inquiries fails to demonstrate a justification for such questioning absent the presence of counsel for the defense. As the Supreme Court indicated in *Miranda v Arizona, supra,* where custodial interrogation proceeds without the presence of defense counsel, the Government bears a 'heavy burden' of demonstrating that the suspect's constitutional rights have been respected."

The Court in *McIntyre v New York,* 329 F Supp 9 (ED NY 1971), adopts the standards of waiver set forth in *Johnson v Zerbst,* 304 US 458, 58 S Ct 1019 (1938), after making the following comment:

> "Once a defendant has asserted his privilege to remain silent a governmental claim of waiver must be scrutinized with special care."

In *Johnson v Zerbst, supra,* the Court said that the courts indulge every reasonable presumption against a waiver and that the Court does not presume acquiescence in the loss of fundamental rights.

In *Mitchell v United States,* 434 F2d 483 (CA DC 1970), the Court said:

> "We recognize that *Miranda* prohibits the inference that a waiver was made simply from the fact that a confession was eventally obtained. (Citations omitted.) Indeed, when the only evidence is that at the start of the interrogation the warnings were given, and at the conclusion of the interrogation a confession had been obtained, courts would do well to require clear evidence of the vital connecting link, i.e., did the interrogated person in fact waive his rights? (Citation omitted.) In the absence of this evidence, *Miranda* is clear that a waiver has not been proven."

And in *United States v Hill,* 340 F Supp 344 (ED Penn 1972), the court said:

> "Thus, when the defendant asserted that he wished to answer no more questions until he had talked to a lawyer, the Secret Service agent was forbidden by *Miranda* any attempt to convince him that he should, in fact, confess. It is true that *Miranda* does not preclude a defendant from subsequently electing to waive his request to terminate uncounseled interrogation, but that election must be reasonably spontaneous."

In the case at bar, the record is entirely barren of any evidence that defendant waived his right to remain silent when Hill began to interrogate him.

After Hill gave defendant the *Miranda* rights again, he immediately told defendant that he had been accused of being the shooter in the Leroy Williams murder. Then Hill told defendant that Smith had confessed and had implicated defendant.

From the foregoing, since defendant had expressed his desire to exercise his 5th Amendment right to remain silent, a knowing, voluntary waiver of his right to remain silent cannot be inferred. What can be inferred is that Hill deliberately confronted defendant with the frightening news that he had been accused of murder and that Smith confessed and made defendant the trigger man with the purpose of shocking the defendant into breaking his silence on the subject. This is evident from the colloquy between Hill and the court where Hill admitted that it was his technique in many cases to tell a person that his partner confessed in order to get that person to confess.

The technique employed by Hill was condemned in similar circumstances in *United States v Barnes,* 432 F2d 89 (CA 9, 1970):

> "Defendants assert that these admissions should have been excluded from their trials on the ground that they were obtained in violation of their constitutional rights; that is, they were made during interrogation which occurred after defendants had refused to answer any further questions about the alleged offenses. . . .

"The evidence in this case is uncontroverted that both Knox and Barnes had specifically indicated that they did not wish to be interrogated further. Each refused to sign a waiver of his constitutional rights and that refusal was noted by the authorities. Thus, the subsequent confrontation with Miss Trosello and the interrogation that followed, for the obvious purpose of getting defendants to abandon their self-imposed silence, *were in flagrant violation of the rule as set forth in Miranda.* We hold that the district courts erred in admitting into evidence the incriminating statements made by the defendants during this illegal interrogation." (Emphasis added.)

In *United States v Hopkins,* 433 F2d 1041 (CA 5, 1970), the Court rejected defendant's claim that his confession should be suppressed because the *Miranda* warnings were not repeated by the second officer who questioned him, the Court finding that unnecessary because the two questionings were one continuous transaction.

"This record pictures an uninterrupted sequence of events beginning with the *Miranda* warnings given by Agent Hanley, including the presence of Hobbs at the third floor interrogation room to take Hopkins to his cell, and culminating with a question on the same matter posed by Hobbs as he and Hopkins returned to the fifth floor. We find that the question of Detective Hobbs was so intertwined with the interrogation by Agent Hanley that Hopkins must have been aware of his constitutional rights with regard to Hobbs' query and, by his answer, Hopkins knowingly waived those rights." 433 F2d at 1045.

It should be kept in mind that Hopkins did not elect to remain silent when Agent Hanley questioned him but answered questions freely.

In the case at bar, we have the reverse of the situation in *Hopkins, supra;* the interrogation of defendant by Hill was so intertwined with the interrogation by Cowie as to be part of it. Hence, the election by defendant to remain silent expressed to Cowie was binding on Hill and it was a flagrant violation of *Miranda* for Hill to ask any further questions of defendant.

This was precisely the point in *Westover v United States,* 384 US 494, 86 S Ct 1638 (1966).

The interrogation of Westover by the city police extended over a long period of time and he had not been informed of his rights. When the city police had finished interrogating Westover, he was "turned over" to the FBI who "on the spot" so to speak, continued the interrogation. The FBI agents gave Westover his rights. But as this Court pointed out, these warnings as to his rights came, from Westover's point of view, at the end of the *entire* process of interrogation, not at the beginning at which time they would have had meaning.

The point surely is that the giving of a warning to a prisoner who has been questioned while in the hostile environment of a police station that he has certain rights is not a magical litany which "sanitizes" or sanctifies all that has preceded and nullifies or assauges to the vanishing point the corecive elements surrounding the interrogation of the prisoner.

To say that the ritual of recitation of rights to the prisoner is an ablution of all coercive acts of the police

is to invite the police to throw the prisoner onto the rack and when his resistance has been stretched to the breaking point, allow them to recite to him his rights and then claim to the court that they have a voluntary confession from the prisoner.

As Senior Circuit Judge Fahy said in dissent in *United States v Poole,* 495 F2d 115, 126 (CADC 1974):

> "Assuming the waivers referred to, the confession itself is not for that reason voluntary—it is simply not inadmissible for non-compliance with *Miranda.*"

Hill denied that Cowie told him that defendant had elected to remain silent. Cowie was equivocal on the point. But that the two police officers talked to one another when defendant was transferred from Cowie to Hill is clear, and it is clear that they talked about Cowie's questioning of defendant. Did not Cowie have a duty to tell Hill that defendant had exercised his right to remain silent?

Or more importantly, did not Cowie have the duty *not* to hand defendant over to Hill for further questioning since defendant had elected to exercise his constitutional right to remain silent?

Whatever view one takes of Cowie's duty in th circumstances, it should be clear that the principle of *Miranda* cannot be circumvented by the police by the simple expedient of shuttling a person from one police officer to another for purposes of questioning and then justify subsequent interrogations after an election to remain silent on the basis that the officer did not know that the defendant had elected earlier to remain silent.

And in *Combs v Wingo,* 465 F2d 96, (CA 6, 1972), the defendant, after having been given his *Miranda* rights said he would make a statement but wanted to talk to an attorney first. The interrogating officer said fine but read to defendant a ballistic report. Thereupon, defendant made an incriminating statement. In granting a writ of habeas corpus, the Court adopted the dissenting opinion of the State Court:

> "The purpose of a question is to get an answer. Anything else that has the same purpose falls in the same category and is susceptible of the same abuses *Miranda* seeks to prevent. The only possible object of showing the ballistics report to the appellant in this case was to break him down and elicit a confession from him. The question was implied if not spoken. Everything was there but a question mark. It was a form of question and got the desired result."

In *Williams v Brewer,* 509 F2d 227, 233-234 (CA 8, 1975), the Court affirmed the district court in the granting of a writ of habeas corpus where the petitioner's confession had been admitted on trial in evidence which was obtained after he elected to remain silent:

> "The facts in this case clearly indicate that the appellee told Detective Leaming several times during the automobile trip to Des Moines that he would tell the whole story *after* consulting with Mr. McKnight [a lawyer]. Despite this indication by appellee that he wished to delay his statement until he had consulted with his attorney in Des Moines, Detective Leaming persisted in his 'conversation' with appellee with the admitted intent of obtaining information before their arrival in Des Moines and

appellee's consultation with his attorney there. By means of a subtle form of interrogation, Leaming did obtain the incriminating statements from appellee."

In *United States v Cooper,* 499 F2d 1060, 1067 (CA DC 1974), the Court said:

> "It seems clear that the weight of authority is that once the suspect, being warned, refuses to sign a proffered waiver without consulting counsel, the custodial interrogation must cease. The interrogation may be validly resumed *only upon the initiative of the suspect,* with a heavy burden upon the United States to establish that fact, failing which a subsequent incriminating statement in answer to resumed interrogation is inadmissible." (Emphasis added.)

In *United States v Clark,* 499 F2d 802, 807 (CA 4, 1974), where the accused had indicated a desire to speak with an attorney but subsequently confessed without consulting with an attorney, the government contending that the accused waived his right to counsel before he confessed, the Court said:

> "Additionally, we note that agent Kenny stated unequivocally that he initiated the interview during which Clark allegedly waived his right to speak with an attorney and confessed. This initiation of the subsequent interview at which the confession was elicited is a factor which, under these circumstances, is a strong indication of involuntariness."

In *United States v Hedgeman,* 368 F Supp 585, 591 (USDC ED Mich 1973), where the accused had indicated

his desire to remain silent but the interrogating agent nonetheless said to the accused that he would be happy to listen to the accused and relay the information to the United States Attorney, the Court said:

> "One who is thus beguiled can hardly be said to have intelligently and voluntarily waived his right to remain silent."

In *Hill v Whealon,* 490 F2d 629, 635 (CA 6, 1974), where it was not clear whether the first interrogating officer had informed the second interrogating officer that the accused had refused to waive his rights, the Court assumed that the second officer was so informed, and the Court went on to quote with approval from *United States v Collins,* 462 F2d 792, 802 (CA 2, 1972):

> "[W]e are agreed that what *Miranda* requires is that 'interrogation must cease' until new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has *voluntarily changed his mind.*" (Emphasis added.)

But in *Hill v Whealon,* it must be noted that the second officer went to the accused's cell and truthfully told him that a confession had been obtained from the accused's accomplice and then the accused was asked if he wanted to talk about it. When the accused said he might as well, the accused was taken from his cell and then all of his rights were again read to him and the officer told the accused that he could not proceed unless the accused waived his rights and the accused then waived his rights and confessed.

Even if we accept the holding in *Hill,* the facts in the case at bar do not parallel those in *Hill* because in the

case at bar, assuming that Officer Hill had been informed by Cowie of respondent's decision to remain silent, officer Hill first advised respondent of his rights and then sprung on him the news, that Anthony Smith supposedly confessed.

Surely, at the very least, officer Hill should have followed the procedure of first informing respondent of what Anthony Smith supposedly said and then asking respondent if he wanted to discuss the matter and if he got an affirmative response, then to warn the respondent that he had a right to remain silent.

8. A Confession Obtained by Trick is not a Voluntary Confession if Other Coercive Elements are Present.

This Court has said that when a confession is obtained by trick it is evidence that the confessor did not voluntarily waive his right to remain silent.

> "Moreover, any evidence that the accused was threatened, *tricked,* or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda v Arizona,* 384 US at 476, 86 S Ct at 1629. (Emphasis added.)

Of course, the falsehood that Hill told respondent does not render respondent's confession in and of itself involuntary, but it is a factor to be considered in the totality of circumstances.

> "The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible." *Frazier v Cupp,* 394 US 731, 739, 89 S Ct 1420, 1245 (1969).

It has been recognized that the methods used by Hill in interrogating respondent were designed to trick him into giving up the exercise of his constitutional rights.

> "From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at time relentless questioning, are employed. To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be attained.' When normal procedures fail to produce the needed result, the police may resort to deceptive strategems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights." *Miranda v Arizona,* 384 US at 455, 86 S Ct at 1617.

Compare the situation in the case at bar with that in *State v Watson,* 487 P2d 197 (N Mex 1971), where the detective said to defendant "Now look John, we can go to trial with one state witness and one defendant or two defendants . . ." This language was held to be an implied promise, and even though *Miranda* warnings were given, the confession was held to involuntary because of the implied promise.

Apart from that consideration, the mere confrontation of defendant with the statement that defendant's purported partner had confessed and put the entire onus of guilt on defendant, was coercive because it raised a fright in defendant that he would be left to bear the heavy burden of a charge of murder in the first degree with all against him. Defendant testified that he was afraid when Hill told him of Smith's statement.

A like situation was considered by the Court in *Bram v United States,* 168 US 532, 18 S Ct 183, 194 (1897), and the Court found the defendant's statement to be involuntary:

> "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how, in reason, can it be said that the answer which he gave, and which was required by the situation, was wholly voluntary, and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect."

Compare the situation in *Everette v Murphy,* 329 F2d 68 (CA 2 1964):

> "From the uncontroverted evidence, however, it is established that Everette was arrested illegally, held incommunicado and questioned extensively without counsel or warning of his right to counsel or his right to remain silent, and the confession followed upon deception and false promises of assistance if he should confess. . . . The deception of Everette as to Finocchiaro's survival of the attack might be ignored if it stood alone. (Citation omitted.) However, here it was used to make more plausible the promise of assistance to induce confession. (Citation omitted.) A confession induced by police falsely promising assistance on a charge far less serious than the police knew would actually be brought is not to be considered a voluntary confession."

The standard to be applied in judging the actions of the police in the case at bar is that set forth in *Rogers v Richmond,* 365 US 534, 544; 81 S Ct 735, 741 (1961):

> "And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner's in fact spoke the truth."

B.

A STATE COURT DECISION SHOULD NOT BE OVERTURNED BY THE COURT IF IT CAN BE JUSTIFIED UNDER STATE LAW AND THE DECISION DOES NOT CONTRAVENE CONSTITUTIONAL STANDARDS SET BY THIS COURT.

The Constitution of the State of Michigan vouchsafes an accused in a criminal matter a right that he not be compelled to incriminate himself, and such right was vouchsafed by the constitutions of the State of Michigan since 1850. The law of the State of Michigan for many decades has prescribed that no confession shall be admitted in evidence unless the prosecution shows first that it was given by the accused freely and voluntarily and that no confession could be regarded as having been freely and voluntarily given unless the police interrogator first, before questions designed to elecit a confession were propounded, advised the accused that he had a right to remain silent and that whatever he said could and would be used against him in a court of law.

The enunciation of the principles in *Miranda* by this Court can be said from a certain point of view to have been a discovery of certain attributes of the ideal principle of prohibition of compelled self-incrimination in criminal proceedings which always inhered in that principle and only waited for an articulation by some court. The principle that an accused in a criminal proceeding could not be compelled to incriminate himself was neither invented nor discovered by the framers of the federal constitution; it had been promulgated in the ecclesiastical and civil courts of England and was embodied in the constitutions of some of the original colonies before being written into the Bill of Rights of the federal constitution.[1]

[1] See VIII Wigmore on Evidence (McNaughton Revision) Chap 80, Privilege Self-incrimination, p 266.

Although the Fifth Amendment to the Constitution of the United States and its guarantees and proscriptions are binding on the individual states as interpreted by this Court and particularly in *Miranda,* it is not to say that the courts of the State of Michigan cannot and have not adopted the principles enunciated in *Miranda* as attributes of the right against self-incrimination as embodied in the Constitution of the State of Michigan.

There is no principle of federal law which prohibits a state court from adopting a rule of law promulgated by a federal court as reflective of federal constitutional law and regarding that rule as part of the state's constitutional law and then grafting onto that rule further standards which are higher or more stringent than the federal court chooses to adopt to its rule.

Therefore, the Michigan courts are free to hold that the rule proscribing any further questioning of an accused who is in custody after he had declared his intention to exercise his right to remain silent cannot be circumvented by the simple expedient of shuttling the accused from officer to officer without the succeeding officers being informed of the fact that the accused has exercised his right to remain silent.

And unless it is absolutely clear that such holding cannot be based upon Michigan constitutional provisions and Michigan statutes and case law, then this Court should not interfere with such holding on the basis that it reflects a higher standard than adopted by this Court.

If the rule adopted by the Michigan court and purporting to reflect principles of Michigan constitutional law and statutes and case law contravene rules and standards es-

tablished by this Court as reflecting constitutional rights and guarantees of the federal constitution which are binding on the states, then this Court has a right to overturn such rule, but if not, not.

See *Oregon v Hass,* — US —, 95 S Ct 1215, 1222-1223-1224 (Mr. Justice Marshall, dissenting) (1975).

CONCLUSION

Under the totality of circumstances, the prosecution has not carried its heavy burden of proving that respondent voluntarily waived his right to remain silent during custodial interrogation.

This Court should affirm the decision of the Michigan Court of Appeals.

Respectfully submitted,

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Dated: